

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MICHAEL MCKNAB
Claimant

VS.

U.S. FOOD
Respondent

AND

KEMPER INSURANCE
Insurance Carrier

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Docket No. 262,847

ORDER

Claimant appealed the March 2, 2006, Award entered by Administrative Law Judge Kenneth J. Hursh. The Workers Compensation Board heard oral argument on July 6, 2006.

APPEARANCES

Bruce Alan Brumley of Topeka, Kansas, appeared for claimant. Thomas Clinkenbeard of Kansas City, Missouri, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

In the March 2, 2006, Award, Judge Hursh found claimant injured his back at work on November 14, 2000, and January 19, 2001. The Judge held claimant failed to introduce credible evidence of his post-injury earnings and, therefore, he failed to prove those earnings were less than 90 percent of his pre-injury average weekly wage. Consequently, the Judge concluded claimant had failed to prove he was entitled to a permanent disability greater than his whole person functional impairment rating. Accordingly, Judge Hursh awarded claimant permanent partial disability benefits under K.S.A. 44-510e for a 10 percent whole person functional impairment.

Claimant contends Judge Hursh erred by concluding he was not entitled to receive a work disability (a permanent partial general disability greater than the whole person functional impairment rating). Claimant argues the Judge erred by imputing a post-injury wage. In support of his work disability request, claimant offers a proposed wage loss of 41 percent and a task loss of 36.5 percent. Claimant asks the Board to award him a 38.25 percent work disability.

Conversely, respondent and its insurance carrier contend the March 2, 2006, Award should be affirmed. They argue claimant failed to prove a critical element in his request for a work disability – wage loss greater than 10 percent – and, therefore, claimant's request for a work disability was properly denied.

The issue before the Board on this appeal is the nature and extent of claimant's disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes the Award should be affirmed.

The parties stipulated claimant injured his back at work on November 14, 2000, and January 19, 2001. The parties also agreed claimant's back injury arose out of and in the course of his employment with respondent. Furthermore, the parties do not challenge the Judge's finding that claimant's back injury comprises a 10 percent whole person functional impairment.

The primary issue in this appeal is whether claimant is entitled to receive permanent partial general disability benefits under K.S.A. 44-510e based upon his impairment rating or a work disability. Judge Hursh specifically found claimant had failed to prove his post-injury earnings were less than 90 percent of his pre-injury average weekly wage and, therefore, limited claimant's permanent disability to the 10 percent whole person impairment rating. *Contrary to claimant's assertions*, the Judge did not impute a post-injury wage.

After considering the entire record, the Board agrees with the Judge's finding that claimant has failed to prove he has suffered a post-injury wage loss that would entitle him to a work disability. Claimant did not return to work for respondent after the January 19, 2001, back injury. Instead, claimant chose to continue and concentrate upon his lawn and landscape business. In addition, claimant began working part-time assembling furniture and working part-time delivering dairy products. And claimant even obtained some work from a temporary employment agency. But at the time of the continuation of the regular

hearing by deposition, claimant was no longer assembling furniture. And he had been offered and had declined full-time employment as a delivery driver for the dairy.

Claimant initially represented he possessed the records to substantiate his income and expenses from his endeavors. Later, however, it was discovered that was not true. Moreover, claimant's failure to file income tax returns for 2002, 2003, and 2004 further thwarted the search for the truth.

Recognizing the confusing state of the evidence and the difficulty in determining the post-injury earnings, claimant has suggested that a post-injury wage of \$400 per week should be imputed. That figure is based upon a 40-hour week at \$10 per hour, which is the hourly rate claimant receives delivering dairy products.

The parties agree K.S.A. 44-510e is applicable to this claim. That statute, which defines permanent partial general disability, provides, in part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

In other words, a worker's post-injury wage loss must be at least 10 percent before that individual would be entitled to receive permanent partial general disability benefits that exceed the whole person functional impairment rating.

This is a matter regarding claimant's burden of proof. And claimant has failed to satisfy that burden. In summary, the Board affirms the Judge's finding that claimant failed

to prove his post-injury wage and, therefore, failed to prove his post-injury wage loss exceeded 10 percent. Consequently, the Judge properly limited claimant's permanent disability benefits to his 10 percent whole person functional impairment rating.

At claimant's November 2005 deposition, claimant attempted to introduce documents that purportedly were obtained from the Internal Revenue Service. Respondent and its insurance carrier objected on the basis of hearsay and lack of foundation. The Board sustains that objection. Nevertheless, those documents would not have altered the Board's ultimate conclusion even if they were considered part of the record.

AWARD

WHEREFORE, the Board affirms the March 2, 2006, Award entered by Judge Hursh.

The record does not contain a fee agreement between claimant and his attorney. K.S.A. 44-536 requires that the Director review such fee agreements and approve such contract and fees in accordance with that statute. Should claimant's counsel desire a fee be approved in this matter, he must submit his contract with claimant to the Judge for approval.

IT IS SO ORDERED.

Dated this ____ day of July, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Bruce Alan Brumley, Attorney for Claimant
Thomas Clinkenbeard, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director